

International Institutions

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Achieving global solutions to universal problems based on international rules continues to be the paramount challenge for international institutions as they seek to work in an entirely new era of advanced technology and increased interdependence. The year 1998 was a tumultuous one for international organizations. It was a year in which the United Nations and its affiliated agencies were pushed to the brink of bankruptcy in the face of U.S. continued nonpayment of over a billion dollars in arrears. In 1998, the new world order of Security Council cooperation stitched together in the aftermath of the 1991 Persian Gulf Conflict began to show signs of fraying in the context of Iraq's repeated refusal to permit U.N. inspections of suspected chemical and biological weapons production sites, Serbia's continued massacre of the Albanian people of Kosovo, and the decision of India and Pakistan to test nuclear weapons. The year was also one in which the international financial institutions had to scramble to implement novel approaches in an attempt to head off a rapidly spreading global financial crisis.

I. The U.N.'s Financial Crisis

A. INTRODUCTION

Eleven years ago, when the United States was just 147 million dollars in arrears to the United Nations, the American Bar Association adopted a resolution that "urges the executive and legislative branches . . . to take cooperative action so that payment will be made without delay to the United Nations, including its specialized agencies, of all amounts assessed to the United States."¹ Due to repeated withholdings and nonpayment during the last decade, by the end of 1998, the United States debt to the U.N. had mushroomed to ten times that amount—over 1.3 billion dollars (which constitutes more than sixty percent of the debt of all member states).

As a result of the United States' nonpayment, the United Nations currently faces its most serious financial crisis. According to Joseph E. Connor, U.N. Under-Secretary-General for

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1. *American Bar Association Section of International Law and Practice Report to the House of Delegates*, 22 INT'L LAW. 1261, 1281 (1988).

Administration and Management, the United Nations is "on the financial brink, lacking both stability and liquidity."² Connor, an American who previously headed the prestigious Price Waterhouse accounting firm, also revealed that the U.N. will soon be unable to pay its employees or carry out humanitarian operations, and could be driven to bankruptcy. In November of 1998, U.N. Secretary-General Kofi Annan warned that the United Nations was "for all practical purposes, in a state of bankruptcy. Our doors are kept open only because other countries in essence provide interest-free loans to cover largely American-created shortfalls."³

B. THE LEGAL OBLIGATION TO MAKE PAYMENTS

In the fall of 1997, the Senate Foreign Relations Committee declared that the U.N. Charter "in no way creates a 'legal obligation' on the U.S. Congress to authorize and appropriate" the money to pay U.N. dues.⁴ Contrary to this assertion, the United States is in fact under a binding international legal obligation to pay in full its assessed contributions to the regular budget and peacekeeping budget of the United Nations. This obligation stems from article 17 of the United Nations Charter. The U.S. freely agreed to pay its assessments when the Senate ratified the U.N. Charter and made the treaty part of the supreme law of the United States. At that time, the U.S. joined the other members of the organization in voting to set the U.S. assessment at twenty-five percent for the U.N.'s general budget and thirty-one percent for the peacekeeping budget, which reflected the U.S. share of the world economy. Moreover, at the insistence of the United States, the U.N. annual budgets are adopted by consensus, meaning the United States can unilaterally block U.N. spending if it chooses.⁵ Similarly, the United States wields control over the U.N.'s peacekeeping budget through the exercise of its veto power in the Security Council, which must approve all peacekeeping operations. But, according to the negotiating record of the U.N. Charter, the decision of the International Court of Justice in the *Certain Expenses* case,⁶ and prevailing state practice (including frequent statements by the United States), once assessments are adopted under article 17, they are binding.⁷

The Vienna Convention on the Law of Treaties (which the United States recognizes as the authoritative guide to current treaty law and practice⁸), states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁹ Although U.S. courts have held that a later act of Congress may supersede an earlier treaty obligation when the two conflict for purposes of domestic law, the treaty obligations nevertheless remain on the international plain, and violations of those obligations continue to be violations of international law.¹⁰

For over thirty-five years, the U.S. Congress, Republicans and Democrats alike, had adhered to a bipartisan consensus that the United States had a legal duty to pay for whatever assessments, to be used for whatever purpose, the collective membership of the United Nations determines

2. Joseph E. Connor, Under-Secretary-General for Administration and Management, U.N. Department of Public Information, U.N. Doc. DPI/1815Rev.12 (1998).

3. Thalif Deen, *Politics—U.N.: U.S. Escapes Penalty, Keeps Its Voting Rights*, INT'L PRESS SERV., Nov. 5, 1998.

4. Richard N. Gardner, *Not Paying U.N. Debt is No Option*, BALTIMORE SUN, Mar. 10, 1998, at 9A.

5. Jose E. Alvarez, *Legal Remedies and the United Nations' A La Carte Problem*, 12 MICH. J. INT'L L. 229 (1991).

6. Advisory Opinion, *Certain Expenses*, 1962 I.C.J. 151 (July 20).

7. Richard W. Nelson, *Current Developments: International Law and U.S. Withholding of Payments to International Organizations*, 80 AM. J. INT'L L. 973, 978 (1986).

8. Message from Department of State to U.S. Senate, S. EXEC. DOC. L., 92nd Cong., 1st Sess. 1 (1971).

9. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 332, U.N. Doc. A/CONF.39/27 (1969).

10. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

are owing, and that it could not unilaterally "pick and choose" among the activities that the organization decides to communally fund.¹¹ During the Reagan Administration, however, the United States first began to fall behind in its payments to the U.N., unilaterally withholding its share of funds budgeted for what it then considered objectionable organizations and programs.¹² The Kassenbaum-Solomon amendment and the Gramm-Rudman-Hollings Act of 1985 resulted in further reductions in U.S. appropriations to the U.N. Recognizing that these withholdings were not valid under international law, the Bush Administration had adopted a five-year repayment plan, but in 1994 Congress reneged.¹³ During the Clinton Administration (which also adopted a five-year repayment plan), the situation has grown even worse. In 1998, the President vetoed House Resolution 1757, which would have provided \$819 million dollars to the United Nations, due to an amendment to the bill that prohibited U.S. funding for overseas family planning programs.¹⁴ In November 1998, the United States, threatened with the loss of its voting rights in the General Assembly as a result of its 1.3 billion dollar arrearage, narrowly escaped the penalty clause contained in article 19 of the United Nations Charter¹⁵ by advancing a token sum of \$197 million to cover some of its arrears.¹⁶

C. THE CONSEQUENCES OF NONPAYMENT

Responding in part to U.S. pressure (and the necessities of getting by with less), in the last few years the United Nations has significantly cut its staff, streamlined its bureaucracy, reduced its programs, established an office of Inspector General, and cut out millions of dollars of redundancy and waste.¹⁷ It has come much closer to becoming the fiscally responsible organization that the United States has demanded. But the U.S. debt has grown so large that it is seriously disrupting the work of the United Nations, instead of moving it toward further reform.

A fiscally healthy United Nations benefits the United States in many ways. The U.N. provides a worldwide forum in which the United States elicits support for its policies, interests, and values, and it establishes worldwide programs that advance those policies, interests, and values. It provides a means for settling disputes peacefully, providing humanitarian relief, furthering human rights, and promoting economic and social development. When dispute settlement requires the use of force, the United Nations provides international legitimacy and support for U.S. actions and sharing of the burden, as has been the case with the Persian Gulf crisis and the conflict in Bosnia. It is ironic that the United States is damaging the United Nations through nonpayment just when the United Nations has been best demonstrating its ability to serve U.S. purposes.

For a typical example of how the financial crisis brought on by the United States effects important U.N. operations, one can look to the experience of the U.N.'s International Criminal

11. Jose E. Alvarez, *The United States Financial Veto*, 90 AM. SOC'Y INT'L L. PROC. 319 (1996).

12. *Id.*

13. WASH. POST WKLY. REP., Mar. 18, 1996.

14. Recently, many in Congress have argued that the United States is justified in its withholdings because it makes billions of dollars in contributions to the United Nations for which it receives no credit or reimbursement. While such extra-budgetary support has been vital to the success of U.N. peacekeeping, the U.N. Charter obligates the United States to appropriate money directly to the United Nations, not just to U.S. agencies to support U.N. operations.

15. Article 19 provides that "a member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years." U.N. CHARTER art. 19.

16. Deen, *supra* note 3.

17. Hans Corell, *The United Nations in Crisis: Reflections from Within the Secretariat*, 90 AM. SOC'Y INT'L L. PROC. 324 (1996).

Tribunal for the former Yugoslavia. The tribunal was established by the United Nations in 1993 to investigate atrocities committed during the Balkan conflict and bring those responsible to justice in order to promote reconciliation and lasting peace in the troubled region. In the summer of 1995, with the U.N. literally running out of cash, it was forced to slow the supply of funds to the tribunal to a trickle. As a consequence (and despite voluntary contributions by the United States and others), the office of the prosecutor was prevented from spending money to send investigators into the field to investigate the massacre of 8,000 civilians at the U.N. "safe area" of Srebrenica. The office was also precluded from recruiting lawyers and investigators, or renewing contracts of current personnel, due to restrictions on United Nations agencies imposed by the Secretary-General in the face of the fiscal crisis. Evidence already gathered from refugee interviews began to pile up unsifted and untranslated. Consequently, the work of the tribunal experienced serious delays. In the context of the former Yugoslavia, justice delayed translated into peace denied.¹⁸

In addition to crippling the important work of the United Nations, the failure of the United States to pay its arrears has undercut a variety of U.S. diplomatic efforts—with our negotiating partners ever more frequently refusing to make concessions to a country which they say has become the world's biggest "deadbeat" nation. According to U.S. Secretary of State Madeleine Albright, "the debt undermines our leadership position in the [United Nations], making it harder for the President or his representatives to bend other members to our will."¹⁹ Albright concluded that the continuing U.S. debt to the U.N. "makes it impossible for us to get what we want at the U.N."²⁰ This was a theme that emerged repeatedly at the Rome Diplomatic Conference for a Permanent International Criminal Court in July 1998.

National public opinion polls taken in 1998 demonstrated that the American public recognizes the important role played by the United Nations, with the percent of the public supporting the United Nations (seventy-two percent) at its highest point since 1959.²¹ The public also recognizes the importance of the U.S. legal obligation to pay its debt to the organization. By a three-to-one margin, the Americans surveyed favored paying the arrears in full.²²

II. Security Council

The three most significant crises facing the Security Council in 1998 concerned Iraq, Kosovo, and India/Pakistan. The dissension among members of the Council with respect to these threatening situations suggest that the era of Security Council effectiveness that marked the 1990s may be coming to a close.

A. IRAQ

The enduring struggle to pressure Iraq into compliance with Security Council Resolution 687 continued to be one of the key issues on the Security Council's radar in 1998. At the conclusion of the Persian Gulf conflict, the Security Council adopted Resolution 687 (1991), which imposes on Iraq the terms required for an end to all U.N. actions, including the lifting

18. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 82 (1997).

19. *U.S. Should Pay Debt to United Nations*, PEORIA J. STAR, Mar. 2, 1998, at A4.

20. *Albright Hopeful U.S. Will Pay "Embarrassing" U.N. Debt This Year*, AGENCE FRANCE PRESSE, Jan. 21, 1999.

21. *Support for U.N. Said to be Growing in U.S.*, REUTERS, Sept. 17, 1998. The poll of 1,005 adults conducted between August 21 and 25, 1998, had a margin of error of 3.1%.

22. *Id.*

of sanctions.²³ To avoid the possibility of a future Iraqi threat using biological or chemical weapons,²⁴ resolution 687 requires Iraq to "unconditionally accept the destruction, removal or rendering harmless, under international supervision, of . . . all chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support, and manufacturing facilities."²⁵ Resolution 687 requires Iraq to divulge the locations, amounts, and types of its chemical and biological weapons to the Secretary-General of the United Nations. The destruction of these materials is to be performed under the supervision of the United Nations Special Commission (UNSCOM), which is charged with the responsibility for inspection and investigation of all known or suspected weapon sites.

After a series of violations of resolution 687 culminating in Iraq's refusal to allow the inspection teams access to sites designated by UNSCOM,²⁶ the United States and Great Britain threatened in February of 1998 to use military force to compel Iraqi compliance.²⁷ The air strike was averted when, on February 23, Iraq's Deputy Prime Minister Tariq Aziz and United Nations Secretary-General Kofi Annan signed a Memorandum of Understanding (MOU) in which Iraq agreed to accord "immediate, unconditional and unrestricted access" to UNSCOM.²⁸

The Security Council had hoped that it had resolved the problem of Iraqi production and stockpiling of weapons of mass destruction²⁹ in March of 1998, when it unanimously endorsed the MOU³⁰ negotiated by Secretary-General Annan and Tariq Aziz.³¹ The body of the MOU

23. U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

24. In a letter to the leaders of the House and Senate regarding Iraq, President Clinton stated in relevant part: Sanctions against Iraq were imposed as a result of Iraq's invasion of Kuwait. It has been necessary to sustain them because of Iraq's failure to comply with relevant UNSC resolutions, including those to ensure Saddam Hussein is not allowed to resume the unrestricted development and production of weapons of mass destruction.

Clinton Letter to the Leaders of House and Senate, Iraq (visited Oct. 1, 1998) <<http://www.usis.usemb.se/regional/nea/gulfsec/dnt201.htm>>.

25. U.N. SCOR, 46th Sess., 2981st mtg. at para. 8, U.N. Doc. S/RES/687 (1991).

26. See *Standoff in Iraq: Chronology of Iraqi Violations* (visited Oct. 1, 1998) <<http://www.foxnews.com/news/packages/iraq/violations.sm>>.

27. See *President Clinton's Address: Text of President Clinton's Address to Joint Chiefs of Staff and Pentagon Staff*, Feb. 17, 1998 (visited Oct. 1, 1998) <<http://paddle4canoe.ca/CNEWSIraq/clintonaddress.html>>.

28. Memorandum of Understanding Between the United Nations and the Republic of Iraq on the UN-Accord on Weapons Inspections, Feb. 24 1998 (visited Oct. 1, 1998) <<http://198.80.36.136/current/news/.../regional/nea/iraq/iraqitm.shtm>> [hereinafter MOU].

29. See S.C. Res. 1154, U.N. Doc S/RES/1154 (1998).

30. MOU, *supra* note 28. The memorandum provides in relevant part:

The United Nations and the government of Iraq agree that the following special procedures shall apply to the initial and subsequent entries for the performance of the tasks mandated at the eight presidential sites in Iraq as defined in the annex to the present Memorandum:

- (a) A special group shall be established for this purpose by the Secretary General in consultation with the Executive Chairman of UNSCOM and the director general of IAEA. This group shall comprise senior diplomats appointed by the Secretary General and experts drawn from UNSCOM and IAEA. The group shall be headed by a commissioner appointed by the Secretary General.
- (b) In carrying out its work, the special group shall operate under the established procedures of UNSCOM and IAEA, and specific detailed procedures, which will be developed given the special nature of presidential sites, in accordance with the relevant resolutions of the Security Council.
- (c) The report of the special group on its activities and findings shall be submitted by the executive chairman of UNSCOM to the Security Council through the Secretary General.

Id.

31. See *Letter from the Secretary-General Addressed to the President of the Security Council* (Feb. 25, 1998), U.N. Doc. S/1998/166 (1998).

reaffirmed the commitment of all U.N. members to Iraq's sovereignty, territorial integrity and political independence, in return for Iraq's promise to permit unrestricted U.N. inspections within its territory.³² The Security Council stressed that any breach would result in the "most serious [of] consequences."³³

It did not take long, however, before disagreements over the interpretation of the MOU arose. Iraq maintained that it had agreed only to an initial visit by U.N. weapons inspectors and that no subsequent visits were needed because Iraq was in full compliance with resolution 687.³⁴ Iraq asked for U.N. economic sanctions to be lifted as the price for any further cooperation.³⁵

Iraq was also unhappy about a draft resolution submitted by the United Kingdom, Sweden, and Portugal at the end of May to make the Oil-for-Food agreement permanent.³⁶ The Oil-for-Food agreement was implemented as a modification to the economic sanctions against Iraq allowing Iraq, under a closely monitored system, to sell a limited amount of oil each year in exchange for revenue for food. Iraq proclaimed that the Oil-for-Food agreement went into its final stage on May 30, 1998, and that the draft violated the provisions of the March MOU, which also indicated that the program would be temporary.³⁷

On August 5, Saddam Hussein unilaterally halted the U.N. weapons inspections when inspectors attempted to enter the so-called "Presidential Sites."³⁸ Iraq maintained that it had destroyed all its weapons of mass destruction and therefore sanctions against the country must be lifted.³⁹ Iraqi authorities confronted UNSCOM head Richard Butler with their demands while he was attempting to conduct weapons inspections in Iraq pursuant to resolution 687 and the March MOU.⁴⁰ Butler told Iraqi authorities he first needed proof that these weapons no longer existed before he could recommend that the Security Council lift the Iraqi sanctions.⁴¹ At that point, Iraq announced its decision to terminate its cooperation with UNSCOM.⁴²

The U.N. Security Council responded by adopting Resolution 1194 (1998), condemning Iraq's refusal to cooperate with weapons inspectors. The resolution suspended upcoming sanction reviews, signaling that there would be no lifting of sanctions.⁴³ The next review would have been set for October, at which time France, Russia, and China were expected to push for a scaling back of some of the economic sanctions against Iraq.⁴⁴

With the United States and United Kingdom threatening unilateral action, Iraq consented to another agreement on November 14 which would allow weapons inspectors into the disputed

32. MOU, *supra* note 28.

33. *Id.*

34. See Report by the Executive Chairman of the Special Commission Established by the Secretary-General Pursuant to Paragraph 9 (B) (I) of Security Council Resolution 687 (1991), on His Mission to Baghdad June 11-15, 1998, U.N. SCOM, Annex, at paras. 11-19, U.N. Doc. S/1998/529 (1998).

35. *Id.*

36. See excerpts from report by the Iraqi news agency INA, BBC SUMMARY OF WORLD BROAD., June 20, 1998, at part 4.

37. *Id.*

38. See *Chronology of Events Leading to U.S. Attack on Iraq* (visited Mar. 9, 1999) <<http://www.state.gov/www/regions/nea>>.

39. *Id.*

40. See August 12th letter from the UNSCOM Executive Chairman Butler on the Implications of Iraq's August decisions, U.N. SCOM, U.N. Doc. S/1998/767 (1998) [hereinafter *Iraq's August Decisions*].

41. *Id.*

42. *Id.*

43. See *Condemnation of Iraq's decision to halt all UNSCOM disarmament work*, U.N. Doc. S/Res/1194 (1998).

44. U.N. Council Suspends Review of Iraq Sanctions, DEUTSCHE PRESSE-AGENTUR, Sept. 9, 1998.

presidential sites.⁴⁵ When Iraq again balked in December, the United States and United Kingdom launched a massive air strike against Iraq despite opposition from France, China, and Russia.⁴⁶ The United States and the United Kingdom asserted such force was permitted by resolution 678, which authorized member states to use all necessary means to uphold and implement "all relevant resolutions" subsequent to resolution 660.⁴⁷ Thus, they took the position that they did not need specific Security Council approval for an attack because they were enforcing resolution 687 per their authority from resolution 678.⁴⁸ Resolution 678 was the "authorizing instrument for Operation Desert Storm" and has never been rescinded.⁴⁹ It authorizes U.N. member states to use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."⁵⁰ Resolution 660 was adopted the day after Iraq invaded Kuwait, and demanded that Iraq unconditionally withdraw from Kuwait.⁵¹ China, France, and Russia counter that the Security Council retains authority under resolution 678⁵² and without explicit authorization by the Security Council, unilateral military action may not be taken by any member except when justified as self-defense.⁵³ Further, China, France, and Russia contend that in light of the formal cease-fire which is in effect, the meaning of resolution 678's phrase "all necessary measures" has substantially changed because the assertions of the United States and United Kingdom, face to face with the current situation, can "no longer reasonably" be said to justify "an ongoing authority to use force."⁵⁴ Finally, China, France, and Russia take the position that the "reference of resolution 678 to upholding and implementing 'relevant resolutions' subsequent to resolution 660" excludes resolution 687 because the reference was intended to mean only those "resolutions adopted between the dates of resolutions 660 and 678."⁵⁵

B. Kosovo⁵⁶

On January 15, 1999, Serb forces massacred forty-five Albanians in the village of Racak in southern Kosovo.⁵⁷ Two days later, the Security Council denounced the incident in a Presidential Statement but took no further action against Serbia.⁵⁸ The day after the incident, on January

45. *Iraq's August Decisions*, *supra* note 40.

46. See William Jefferson Clinton, Statement by the President (Dec. 16, 1998) available in LEXIS, News Library, CURNWS File. See also Interview by Jim Lehrer with Thomas Pickering, Under-Secretary for Political Affairs, Washington, D.C. (Dec. 22, 1998).

47. See David Buchan, *Russia and China Head Global Critics*, FIN. TIMES (London), Dec. 18, 1998, at 1. The governments of several other members of the Security Council, including China, France, and Russia have disputed that resolution 678 can be used as an ongoing authority to use force. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

56. Kosovo is Serbia's southernmost province and is part of the Federal Republic of Yugoslavia.

57. See Melissa Eddy, *Ethnic Albanians in Kosovo Slaughtered in Worst Massacre in Separatist Conflict*, BUFFALO NEWS, Jan. 17, 1999, at 3A. Forty-five ethnic Albanians were killed supposedly in retaliation for the ambush and murder of four Serb officers. It was reported as quite brutal with some of the victims said to have had their eyes gouged out or heads smashed in, and at least one man was found decapitated. *Id.*

58. See U.N. Sec. Council, Presidential Statement, at U.N. Doc. S/PRST/1999/2 (1999). Text of Presidential Statement adopted Jan. 19, 1999.

16, both U.S. President Clinton⁵⁹ and U.S. Secretary of State Madeleine Albright⁶⁰ not only condemned the acts of violence but specified in their statements to the press that such acts in violation of agreements with NATO⁶¹ will not be tolerated.

Albanians are the ethnic natives of Kosovo, making up ninety percent of its population.⁶² Since the beginning of the Ottoman Empire, 800 years ago, control of the region has shifted back and forth between Serbs and Albanians.⁶³ In 1913, the Serbs seized the region and proclaimed it their fatherland.⁶⁴ Serbia began deporting Albanians *en masse* to Turkey in the 1930s.⁶⁵ While the province has experienced continuous cycles of murders, torture, and arrests of Albanians by Serb secret police, this current crisis has observers fearing that Kosovo will become another Bosnia.⁶⁶

Reports of genocide in the former Yugoslavia have resulted in an increasingly assertive role for NATO, in the face of Security Council paralysis and acquiescence.⁶⁷ At the Dayton Peace Accords, Kosovo activists pleaded to be included within the UN-NATO cooperative peacekeeping missions along with Bosnia and Croatia.⁶⁸ However, their pleas fell on deaf ears and critics contended the "United Nations, under Boutros-Boutros Ghali, [had] failed miserably."⁶⁹

Thus, when violence engulfed the province in the fall of 1998,⁷⁰ the Security Council scrambled to adopt a resolution⁷¹ before the end of NATO's ten day cease-fire deadline.⁷² The initial Serb offensive launched in Kosovo against the ethnic Albanians occurred on September 22, 1998.⁷³ On the second day of the offensive, the U.N. Security Council adopted resolution

59. See Statement by the President On the Massacre of Civilians in Racak, 35 WKLY. COMP. PRES. DOC. 74 (Jan. 16, 1999).

60. Secretary of State Madeleine K. Albright, Press Availability: Kosovo following Volunteer Event at Children's Hospital, Washington, D.C., Jan. 18, 1999, as released by the Office of the Spokesman, U.S. Department of State available at <<http://secretary.state.gov/www/statements>>.

61. NATO, the North Atlantic Treaty Organization, was created after World War II to defend against the perceived worldwide communist offensive. It was formed pursuant to article 51 of the U.N. Charter, which provides the right for the collective self-defense by regional organizations. The most important aspect of the treaty is article 5, which states an armed attack against one or more members of the treaty is an armed attack against all of them. When fighting broke out in Yugoslavia in 1992, NATO forces entered the region to implement peace efforts. Later, under the cooperative authority of the U.N., NATO troops conducted air strikes and patrolled the established no-fly zones over the Balkan region. See The North Atlantic Treaty, Apr. 4, 1949, art. 5, para. 1-2, 63 Stat. 2241, 2244 34 U.N.T.S. 243, 246.

62. See Abdussalam Chouia, *Will Kosovo Become Another Bosnia?*, S.F. CHRON., Aug. 5, 1998, at A19.

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. See *World in Brief/Yugoslavia: Despite Denial, Serbs Press Kosovo Attacks*, L.A. TIMES, Sept. 29, 1998, at A20.

68. See Chouia, *supra* note 62.

69. See *id.*

70. See George Gedda, *With NATO Poised to Unleash Air Strikes on Serb Forces in Kosovo, Some Wonder How the Crisis Reached This Point*, BUFFALO NEWS, Oct. 5, 1998, at 1A. In May, after the world heard reports of genocide and torture in Kosovo, Albania made requests for NATO to intervene in the region. Tensions continued in the region throughout the summer months until full-fledged combat broke out between the Serb forces and the ethnic Albanians. See *id.*

71. See S.C. Res. 1203, U.N. Doc. S/Res/1203 (1998).

72. See Kosovo Diplomatic Observer Mission Daily Report Oct. 18, 1998, The U.S. Mission to NATO: KFOR 20/10/98 (visited Mar. 10, 1999) <<http://www.nato.int/usa/other/p981018a.htm>>.

73. See Craig Turner, *U.N. Vote Paves Way For Force In Kosovo; Balkans: Resolution Calls for Cease-Fire In Separatist Serbian Province Technically, Measure also provides for Military Action*, L.A. TIMES, Sept. 24, 1998, at A12.

1199 (1998) which called for an immediate cease-fire.⁷⁴ Technically, the resolution can be interpreted to open the door for the use of military force because, while its text does not specifically address the threatening of force or set a deadline for compliance, it was adopted under Chapter VII of the U.N. Charter which permits military action to enforce compliance.⁷⁵ NATO interpreted this as its green light to increase its military preparedness as it repeatedly threatened to implement air strikes against the Serbs if they did not loosen their offensive stronghold.⁷⁶ Serbia was continually undeterred by NATO's threats. NATO then issued a final warning and said that air strikes would commence against the Serbs if they did not withdraw their troops and secret police within ten days.⁷⁷ After NATO's ten day deadline was implemented, a cease-fire agreement was negotiated between U.S. Special Envoy Richard C. Holbrooke and Yugoslav President Slobodan Milosevic. Shortly thereafter, the Security Council adopted resolution 1203⁷⁸ which expressed Security Council's approval of NATO's actions.⁷⁹ China abstained from the vote⁸⁰ and Russia made it a point to reiterate its position that all acts of military force needed specific Security Council approval.⁸¹ The resolution further asks both the Yugoslav and Kosova Albanian leaders to comply fully and swiftly with the relevant U.N. Resolutions and to cooperate fully with a verification mission in and over Kosovo.⁸²

C. NUCLEAR ARMS RACE IN SOUTH ASIA

The Security Council unanimously condemned Pakistan and India for conducting underground nuclear testing.⁸³ Currently, only the five permanent members of the Security Council are allowed to possess nuclear arms under the Nuclear Non-Proliferation Treaty.⁸⁴ Unable to

74. See S.C. Res. 1199, U.N. Doc. S/RES/1199 (1998).

75. See *id.*

76. See Greg Seigle, *NATO Forces Ready to Strike Yugoslavia*, JANE'S DEFENCE WKLY., Oct. 7, 1998.

77. See John M. Goshko, *U.N. Council Backs Kosovo Pact, Clears Way for NATO Intervention*, WASH. POST, Oct. 25, 1998, at A28.

78. S.C. Res. 1203, U.N. Doc. S/RES/1203 (1998).

79. *Id.*

80. See Craig Turner, *U.N. Vote Paves Way for Force in Kosovo; Balkans: Resolution Calls for Cease-fire in Separatist Serbian Province. Technically, Measure Also Provides for Military Action*, L.A. TIMES, Sept. 24, 1998, at 12. Reportedly it was difficult to get the resolution to a vote because of arguments from representatives of Russia and China, who did not want force used. See *id.*

81. See *id.* After the breakup of the former Eastern bloc nations and the January 1994 Partnership for Peace, NATO extended an invitation for the former Soviet states and nations of the Warsaw pact to join their organization. However, Russia never joined and although it maintains a 'special relationship' with the organization, it does not have voting power. See *Transformation of NATO's Defence Posture*, (visited Mar. 10, 1999) <<http://www.nato.int/docu/facts/trans.htm>>.

82. See *id.*

83. See U.N. Sec. Council Presidential Statement, U.N. Doc. S/PRST/1998/12 (1998); U.N. Doc. S/PRST/1998/17 (1998). The statement, issued after Pakistan conducted tests, deplored both India and Pakistan.

The Security Council strongly deplores the underground nuclear tests that Pakistan conducted on 28 May 1998, despite overwhelming international concern and calls for restraint. Reaffirming the Statement of its President of 14 May 1998 (S/PRST/1998/12), on Indian nuclear tests of 11 and 13 May, the Council strongly urges India and Pakistan to refrain from any further tests. It is of the view that testing by India and then by Pakistan is contrary to the de facto moratorium on the testing of nuclear weapons or other nuclear explosive devices, and to global efforts towards nuclear non-proliferation and nuclear disarmament. The Council also expresses its concern at the effects of this development on peace and stability in the region.

See *id.*

84. See John Holum, Acting Under-Secretary of State for Arms Control and Political-Military Affairs, Special Briefing on the Comprehensive Test Ban Treaty (Apr. 7, 1998) (visited Mar. 10, 1999) <http://www.state.gov/www/policy_remarks/1998/980407_holum_sb_ctbt.html>.

persuade the Council to take more concrete action, the United States unilaterally imposed sanctions on the two countries.⁸⁵ The sanctions were lifted when India and Pakistan pledged to cooperate with the United States and implement a four point plan to "sign and ratify the Comprehensive Test Ban Treaty; halt the production of fissile material; tighten export controls on sensitive materials and technologies; and limit the development and deployment of missiles and aircraft capable of carrying nuclear weapons."⁸⁶

D. SECURITY COUNCIL REFORM

Recently, Japan and Germany have become increasingly vocal about their desire to become permanent members of the Security Council. Currently, only the major powers of the World War II era possess permanent membership on the Council and the power to veto Council actions. The permanent members are Britain, France, China, Russia, and the United States. Japan, in particular, has launched a campaign to amend the U.N. Charter to enable it to become a permanent member.⁸⁷ Japan's immediate aim is to expand the number of Security Council seats in the hopes that an increased number of seats will assist in its ultimate goal of securing permanent membership with or without the veto.⁸⁸ An amendment of the U.N. Charter requires the approval of the Security Council (including the concurrence of the five permanent members) followed by a vote of the General Assembly.⁸⁹

III. International Court of Justice

There have been major developments in at least two cases on the International Court of Justice (ICJ) docket with respect to the justiciable questions in the *Lockerbie* case and the ancillary jurisdiction of counterclaims in the *Oil Platforms* case. The remaining five pending cases and the one sole case under deliberation also made strides with respect to various pre-adjudication and post-adjudication procedural issues.

A. QUESTIONS OF INTERPRETATION & APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA V. UNITED KINGDOM) & (LIBYAN ARAB JAMAHIRIYA V. UNITED STATES)

This case ascends from the bombing of Pan Am Flight 103 in 1988. In March 1992, Libya submitted two separate applications against the United States and United Kingdom to the ICJ, in an attempt to head off their actions to apprehend the alleged Libyan terrorist suspects. In its submissions, Libya asserts that the only applicable treaty among the three parties is the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), which permits Libya to extradite or prosecute the two alleged terrorists. Libya asserts that it has fully complied with this treaty, while the United States and United Kingdom have breached several provisions by refusing to provide their evidence for the Libyan investigation and by threatening to use force to induce Libya to extradite the suspects. Libya further argues that Security Council Resolutions 748 and 883, which require Libya to extradite the suspects to the United States or United Kingdom for trial, exceed the power of the Security

85. *A Bomb in Every Backyard?*, *ECONOMIST*, June 6, 1998, at 17.

86. *America, India & Pakistan*, *FOREIGN REPORT JANE'S INFO. GROUP LTD.*, Dec. 17, 1998.

87. *Govt. to Seek Expansion of Security Council Seats*, *DAILY YOMIURI* (Tokyo), Dec. 28, 1998, at 2.

88. *See id.*

89. *See* U.N. CHARTER art. 109, ¶ 1-3.

Council under the Charter of the United Nations.⁹⁰ In response, the United States and United Kingdom filed three preliminary objections asserting: (1) the court lacked jurisdiction; (2) Libya's application was inadmissible; and (3) the Libyan claims were without merit because of the adoption of the disputed Security Council resolutions.⁹¹ The court heard oral arguments on these objections in October 1997 and ruled on them, by clear majorities, in February 1998.⁹²

The court held that it had the preliminary jurisdiction to decide whether the destruction of Pan Am Flight 103 is governed by the Montreal Convention. It found that a justiciable dispute existed under the convention's provisions relating to the prosecute-or-extradite option (articles 1, 5, 6, and 8) and state assistance with criminal proceedings (article 11).⁹³ The court rejected the U.S. and U.K. argument that the convention was inapplicable because the case concerned "a threat to international peace and security resulting from state-sponsored terrorism" rather than a bilateral difference among nations under the Treaty.⁹⁴ The court found that Libya had complied with the ICJ jurisdiction clause of the Montreal Convention (article 14) and since the claim was unequivocally opposed by both respondents, the court consequently had jurisdiction to proceed on the merits.⁹⁵

In their second preliminary objection, the United States and United Kingdom asserted that Libya's application was inadmissible because Libya's claims are superceded by Security Council Resolutions 731, 748, and 883, which require Libya to surrender the suspects notwithstanding its option to prosecute under the Montreal Convention.⁹⁶ According to the United States and United Kingdom, those resolutions, in and of themselves, define the responsibilities of the interested parties and, in seeking the court's review of them, Libya was attempting to undo their supremacy under article 103 of the U.N. Charter.⁹⁷ In addition, the United States and United Kingdom argued that the resolutions rendered the claims alleged by Libya without object because the resolutions of the Security Council precluded the relief sought and undermined the practicality of adjudicating the case on the merits.⁹⁸ The court acknowledged that certain events subsequent to the filing of an application may preclude it from adjudication and render a case moot. Yet, the judges determined under article 79(1) of the Rules of Court that the respondent's objections were "preliminary" and, therefore, the question turned on whether the controversy was "exclusively" preliminary, or was so closely related to the merits to justify a need to investigate it through the adjudication process.⁹⁹

Ultimately, the court sided with Libya with respect to the timeliness of its jurisdiction. The judges held that they maintained jurisdiction over whether a dispute existed *at the time the*

90. John J. Kim & Gregory Gerdes, *International Institutions, International Legal Developments in Review: 1998*, 32 INT'L LAW. 575, 577 (1998).

91. See Peter H. F. Bekker, *International Decision: Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 92 AM. J. INT'L L. 503 (1998).

92. See *id.*

93. See *id.* at 503.

94. *Id.* at 504.

95. See Questions of Interpretation & Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), paras. 20-21, 33-35 (Feb. 27, 1998) (judgment) available at <http://www.icj-cij.org/iccjwww/ldocket/ilus/ilusjudgment/ilus_jjudgment_980227_frame.htm> [hereinafter *Montreal Convention Judgment*].

96. S.C. Res. 731, U.N. SCOR, 47th Sess., 3033rd mtg., U.N. Doc. S/RES/731 (1992); S.C. Res. 748, U.N. SCOR, 47th Sess., 3063rd mtg., U.N. Doc. S/RES/748 (1992); S.C. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg. at 113, U.N. Doc. S/RES/883 (1993).

97. See Bekker, *supra* note 91, at 508.

98. See *id.* at 505.

99. See *id.*

applications were filed and in this case the Security Council resolutions were adopted after Libya filed its applications with the court.¹⁰⁰ The court declined to resolve the case in substance at its preliminary stage, concluding that the arguments raised by the United States and United Kingdom raised difficulties that were not of an "exclusively preliminary character and should thus be decided on the merits phase of the dispute."¹⁰¹

B. OIL PLATFORMS (ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

In March 1998, the ICJ held that the counterclaims filed by the United States were admissible and therefore could become part of the proceedings on the merits of the *Oil Platforms* case.¹⁰² The court ruled similarly in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*¹⁰³ on December 17, 1997. These rulings constitute the first time since 1952 that the ICJ has utilized its ancillary jurisdiction jurisprudence on counterclaims.¹⁰⁴

The U.S. counterclaim requested that the court find "that in attacking vessels, laying mines in the Gulf, and otherwise engaging in military actions in 1987 and 1988 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X" of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran of August 15, 1955, "for which Iran must make full reparation to the United States."¹⁰⁵ The United States argued that its counterclaim was directly connected to the subject matter of Iran's claim given the totality of the circumstances that originally caused the United States to attack the Iranian oil platforms. Drawing on the language of article 80 of the Rules of the Court, the United States argued that a proper counterclaim need not relate to the same facts and legalities as the original claim. Rather, as long as there is a direct connection between the counterclaim and the original claim, joinder is proper. Iran reserved its right to raise preliminary objections against the counterclaim because its position was that, under article 80(3), the issue of whether there is a direct connection and/or jurisdiction over a counterclaim comes subsequent to a hearing exclusively examining whether the counterclaim should initially be joined.¹⁰⁶

Finally, the ICJ found that it had jurisdiction to hear the U.S. counterclaim "in so far as the facts alleged may have prejudiced the freedoms guaranteed by article X, paragraph 1."¹⁰⁷ Hence, while the court agreed with Iran that its general jurisdiction over this case covered only those claims made by Iran under article X, paragraph 1 of the Treaty and under no other

100. See Montreal Convention Judgment, *supra* note 95, para. 37 (citing *Nottebohm (Liech. v. Guat.)*); see also Preliminary Objection, 1953 I.C.J. 111, 122 (Nov. 18); *Right of Passage Over India Territory (Port v. India)*, Preliminary Objections, 1957 I.C.J. 125, 142 (Nov. 26).

101. Bekker, *supra* note 91, at 505; Montreal Convention Judgment, *supra* note 95, paras. 40-41. Please note that the only other new development since the February decision was the grant of an extension from the December 30, 1998, deadline to March 31, 1999, for the United States and United Kingdom to file their counter-memorials.

102. See *Oil Platforms (Islamic Republic of Iran v. United States)* (order of Mar. 10, 1998) available at <<http://www.icj-cij.org>>.

103. See *Application of the Convention on the Prevention & Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo.)* (Order of Dec. 17, 1997) (visited Mar. 10, 1999) <<http://www.icj-cij.org>>.

104. See Peter Bekker, *Application of the Convention on the Prevention & Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo.)*, *Oil Platforms (Islamic Republic of Iran v. United States)*, 92 Am. J. Int'l L. 508 (1998) [hereinafter Bekker on Counterclaims].

105. Treaty of Amity, Economic Relations & Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, cited in Bekker on Counterclaims, *supra* note 104, at 511.

106. Bekker on Counterclaims, *supra* note 104, at 511.

107. See *Oil Platforms (Islamic Republic of Iran v. United States)*, (Order of Mar. 10) (slip opinion) available at <<http://www.icj-cij.org>>.

provision, the court also found it proper to consider the U.S. position that "Iranian attacks on shipping, the laying of mines, and other military actions" were capable of falling within the scope of article X, paragraph 1 of the treaty which will be explored during the merits of the case.¹⁰⁸

C. APPLICATION OF THE VIENNA CONVENTION ON CONSULAR RELATIONS
(PARAGUAY V. UNITED STATES)¹⁰⁹

Angel Francisco Breard, a Paraguayan citizen, was executed in the United States on April 14, 1998, for attempted rape and murder. Appeals made by both the Paraguayan government and Mr. Breard to place a stay on the execution on the basis of certain diplomatic rights were denied, *per curiam*, by the U.S. Supreme Court.¹¹⁰ Prior to the execution, Paraguay filed an application against the United States with the ICJ. It alleged violations of both the Vienna Convention on Consular Relations¹¹¹ and the U.S.-Paraguay Treaty of Friendship¹¹² because the U.S. government did not inform Breard of his right to contact a Paraguayan consular officer at the time of his arrest. Although the ICJ granted Paraguay's request for provisional measures requesting the United States not to carry out the execution,¹¹³ the state of Virginia went ahead with the execution. After the United States issued an apology, Paraguay requested that the ICJ dismiss the case.¹¹⁴

D. MARITIME DELIMITATION & TERRITORIAL QUESTIONS BETWEEN QATAR & BAHRAIN
(QATAR V. BAHRAIN)

This dispute arises from the time when the British government territorially occupied Qatar, Bahrain, and the Hawar Islands.¹¹⁵ The only new development in 1998 was the court's requests for the submission of additional written pleadings concerning the sovereignty of the Hawar Islands and the delimitation of maritime areas.¹¹⁶

E. GABCIKOVO-NAGYMAROS PROJECT (HUNGARY V. SLOVAKIA)

Hungary had until December 7, 1998, to file a written statement with the ICJ explaining its position and to respond to Slovakia's request for an additional judgment submitted on September 3, 1998.¹¹⁷ The request came after Hungary refused to negotiate with Slovakia pursuant to the judgment delivered by the court in September 1997, with respect to its dams on the Danube River.¹¹⁸ That judgment found that both nations breached the objectives of

108. Bekker on Counterclaims, *supra* note 104, at 513. Iran's reply deadline extended until March 1999. U.S. deadline to file for rejoinder extended until November 2000.

109. See Application of The Vienna Convention on Consular Relations (Paraguay v. United States), (Provisional Measures Order of Apr. 9, 1998) available at <<http://www.icj-cij.org>>.

110. See Breard v. Greene, 523 U.S. 371 (1998) (denied *per curiam*).

111. See Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

112. See Treaty of Friendship, Commerce & Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091.

113. See I.C.J. No. 98/36 (Nov. 11, 1998).

114. See *id.*

115. See *id.*

116. See Ingrid Persuand & Richard Thruston, *Recent Developments at the ICJ*, ASIL NEWSL. (Interest Group on International Organizations), Fall 1998, at 17.

117. See *id.* at 18.

118. See Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Sept. 25, 1997) (judgment) available at <http://www.icj-cij.org/icjwww/idocket/ih/ihjudgment/ih_jjudgment_97025_frame.htm> [hereinafter Gabcikovo-Nagymaros judgment].

the 1977 Budapest Treaty and their legal obligations to one another.¹¹⁹ The court then ordered them to proceed to negotiate, in good faith, the "construction and operation of the dams on the Danube River and the Gabčíkovo-Nagymaros barrage system."¹²⁰

F. LAND & MARITIME BOUNDARY BETWEEN CAMEROON & NIGERIA (CAMEROON V. NIGERIA)

On June 11, 1998, the ICJ affirmed that it had jurisdiction in this dispute between Cameroon and Nigeria, despite the eight preliminary objections filed by Nigeria.¹²¹ Hence, the court found the case does possess several justiciable issues. It decided to refrain from ruling on one of the eight objections, which it found was too closely related to the merits of the case, and was outside the scope of the court's preliminary ruling power.¹²²

G. DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

This recently filed case arises from the request for an advisory opinion¹²³ to evaluate the scope of privileges and immunities that U.N. officials enjoy in their missions as representatives of the organization, in particular under Article VI § 22 of the Convention of Privileges and Immunities of the United Nations.¹²⁴ The case stems from a libel claim filed against Special Rapporteur Dato Param Kumaraswamy for alleged defamatory statements made during an interview with a magazine that resulted in Malaysian judgments against him totaling \$112 million in damages.¹²⁵ The U.N. has taken the position that Mr. Kumaraswamy has certain speech and debate immunities related to his duty as a U.N. official, and therefore he is judgment proof.¹²⁶

H. FISHERIES JURISDICTION (SPAIN V. CANADA)

This is the only case currently under deliberation by the ICJ. On June 17, the court concluded public hearings on the focus of this case: jurisdiction.¹²⁷ The case arises out of a situation in March 1995 when officials from a Canadian patrol boat boarded a Spanish fishing boat on the high seas off the coast of Canada.¹²⁸ Spain filed an application with the ICJ on the basis that Canada had violated customary international law with respect to the freedom of navigation and fishing on the high seas as well as its flagship jurisdiction.¹²⁹ Canada contends that the ICJ does not have jurisdiction due to Canada's reservation to submit only to "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the enforcement of such measures," when it accepted the court's compulsory jurisdiction.¹³⁰

119. *See id.*

120. *Id.*

121. *See id.*

122. *See id.*

123. By ECOSOC in 1998. It should be noted that Malaysia did oppose the submission and will make its own presentation of arguments.

124. *See* Gabčíkovo-Nagymaros judgment, *supra* note 118.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *Id.*

IV. International Law Commission

The International Law Commission (ILC) is "an United Nations advisory group composed of jurists from around the world," that works to develop and draft codes for the law of treaties.¹³¹ In their Fiftieth Session¹³² the ILC debated six topics. The two topics gaining the most attention were "state responsibility" and "reservations to multilateral treaties."¹³³

A. STATE RESPONSIBILITY

The allocation of state responsibility in treaties places a duty upon specific state action(s), which individual states must meet. Last year, several draft articles were adopted and read into the ILC's current quinquennium.¹³⁴ In 1998, members of the ILC decided to analyze and examine the concepts of *jus cogens* norms and *erga omnes* obligations and create a working group which would remove the concept of state crimes from further consideration during the commission's work, but to do so without taking a position on whether state crimes themselves exist.¹³⁵ State crimes, countermeasures, and dispute settlement procedures have been the most divisive issues addressed by the ILC under state responsibility.¹³⁶

Thus, it was not surprising when it came time to make recommendations to reformulate article 19 on state crimes that two opposing camps emerged within the ILC this session. One side called for the entire fundamentally flawed concept of state crimes to be removed.¹³⁷ It argued "that state practice (including the case law of the International Court) does not support the notion of crimes committed by states, and that stigmatizing entire societies as criminal because of acts committed by their leaders is a dangerous idea."¹³⁸ Moreover, it suggested replacing article 19 with a calibrated notion of wrongfulness that could apply to all violations of the principal rules of international law.¹³⁹ The opposing side stressed that for more than twenty years the ILC had proceeded on the assumption that state crimes would be part of its final recommendations on state responsibility and that it should not deviate from that path. Particularly, because while article 19 may need reformulation, extreme violations of human rights (such as genocide) should not be heaped in with crimes that are not considered *mala in se*.¹⁴⁰

B. RESERVATIONS TO MULTILATERAL TREATIES

In addition to adopting guidelines on the purpose of a reservation, when one may be formulated, its territorial scope, and the territorial application of a treaty and reservations formed

131. MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 15 (1988).

132. Part I was held in Geneva from April 20 to June 12, 1998. Part II was held in New York from July 27 to August 14, 1998. The session was split this year because the Rome Conference on an International Criminal Court also convened this summer.

133. Gregory H. Fox, *The 50th Session of the International Law Commission*, ASIL NEWSL. (Interest Group on International Organizations), Fall 1998, at 17. (The other four topics were: (i) international liability for injurious consequences arising out of acts not prohibited by international law; (ii) state succession and its impact on nationality of natural and legal persons; (iii) diplomatic protection; and (iv) unilateral acts of States.)

134. See *Report of the International Law Commission on the Work of Its Fiftieth Session*, U.N. GAOR International Law Commission, 53rd Sess., Supp. No. 10, U.N. Doc. A/53/10 (1998).

135. See *id.*

136. See *id.*

137. See *id.*

138. *Id.*

139. *Id.*

140. *Id.*

jointly, the ILC adopted Special Rapporteur Alain Pellet's aggregated definition of "reservation," which he created by merging the definitions from three previous Vienna Conventions.¹⁴¹ Accordingly, the ILC determined that:

"Reservation" means a unilateral statement, however phrased or need, by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving, or acceding to a treaty or by a State when making a notification of succession to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or that organization.¹⁴²

V. International Financial Institutions

At the year's outset, few disagreed that the World Bank and the International Monetary Fund (IMF) needed reform. Some suggested reconfiguring the two into a sort of super international Federal Reserve Board to support troubled currencies with trillions of dollars in assets.¹⁴³ Others believe that though the World Bank and the IMF have overlapping functions, they have different roles. Principally, the World Bank provides loans to developing nations to help them thrive in the world economy.¹⁴⁴ In contrast, the IMF mainly concerns itself with countries' fiscal policies and tries to maintain the world's currencies by ensuring that payments of credit between countries flow.¹⁴⁵ The IMF also lends money to its members who face serious balance of payments deficits.¹⁴⁶

A. WORLD BANK

In its search for global relevance, the World Bank continues to grapple in its quest to demonstrate it has what it takes to lead into the next millennium. In an effort to rescue itself from obscurity, the World Bank has begun work on projects that fall in line with the prevailing doctrine of privatization. One example is the collaborative program the World Bank has entered into with the government of Norway to address climate change, which encourages private-public solutions in an effort to curb carbon monoxide emissions and decrease air pollution.¹⁴⁷ The World Bank and the Inter-American Development Bank have also begun granting extra loans to help mobilize resources and raise awareness of the computer millennium bug.¹⁴⁸ This comes in response to the growing concern that emerging markets are falling too far behind in their efforts to avoid problems in the year 2000.¹⁴⁹

141. *Id.*

142. *Id.*

143. See Philip Shenon, *The Clinton Budget: Foreign Affairs, A warning about chaos from Asia*, N.Y. TIMES, Feb. 3, 1998, at 17. Congress has been one of the harshest critics, with many demanding that the two institutions be completely overhauled. However, it does have considerable clout with 14% of the vote in both institutions, and it is the largest single contributor.

144. See *World Bank Home Page* (visited Mar. 10, 1999) <<http://www-esd.worldbank.org>> [hereinafter *World Bank*].

145. See *IMF Home Page* (visited Mar. 10, 1999) <<http://www.imf.int>>.

146. See *id.*

147. See *World Bank*, *supra* note 144.

148. See *World Bank Y2K Home Page* (visited Mar. 10, 1999) <<http://www.worldbank.org/y2k>>.

149. See *id.*

B. IMF

After enduring harsh criticisms from many quarters, the IMF has begun to shift its substantive stance on capital flows and has continued to implement more procedural reforms. The most explicit indicator that the IMF's views on the efficiency of capital controls has shifted comes from its annual report on International Capital Markets.¹⁵⁰ In its report, the IMF concludes from the recent financial crisis in Asia that aggressive movements of capital can revive the economies of some countries. Yet the IMF simultaneously recognizes that opening economies to free flows of capital too soon may be a calamity in and of itself.¹⁵¹

The IMF's traditional policies focused on sound money, prudent fiscal policies, and open markets.¹⁵² While IMF economists stridently express the need for the complete openness of countries to foreign capital, critics contend that the Asian crisis has challenged these policies.¹⁵³

As part of containing a financial crisis, the IMF warns that there are limits on which financial sectors can be strengthened. The IMF suggests that policy makers may need to impose temporary measures to restrain certain types of inflows, which include various prudential controls such as attempting to increase the cost of using external debt, especially for the short term.¹⁵⁴ Specific proposals include using a Chilean-style tax.¹⁵⁵ The Chilean tax system requires that those who borrow capital from abroad deposit thirty percent of the loan for one year in the Chilean Central Bank at a zero percent interest rate.¹⁵⁶ The result of such financial quarantine periods is to discourage short-term speculative capital investors and thus minimize the risk of agitations in the market. Finally, the IMF report highlighted problems arising from liquid cross-border loans between banks that can be quickly withdrawn.¹⁵⁷ The IMF suggests using preventive measures such as limits on capital assets and requirements for banks receiving the liabilities, while also changing the capital requirements for lending banks.¹⁵⁸

1. Asia

Early this year there were other signals that the policies of the IMF have softened in Thailand, South Korea, and Indonesia where the IMF set less stringent financial targets and allowed for more time to reduce budget deficits.¹⁵⁹ The IMF also agreed to accept somewhat lower interest rates than the original rescue plans prescribed,¹⁶⁰ and in Indonesia the IMF is allowing for the phasing out of subsidies for food and fuel at a slower rate than initially required.¹⁶¹ This development is extraordinary since subsidies are the anathema of IMF policies because they severely distort a country's economy. The IMF, however, still demanded a reduction in Indone-

150. See *World Economic Outlook & International Capital Markets-Interim Assessment*, available at <<http://www.imf.int/external/puos/it/weo/weo1298>>.

151. See *id.*

152. See *Integration of the Economies in Transition into the World Economy*, IMF Doc. A.53/306 (1998) [hereinafter *Integration*].

153. See *Financial Times*, IMF shifts stand on effects of capital flows, FIN. POST, Sept. 22, 1998, at 18.

154. See *Integration*, *supra* note 152, at 5.

155. See *id.* at 7.

156. See *id.*

157. See *id.*

158. See *id.*

159. See Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea & Thailand: A Preliminary Assessment*, Preliminary Copy, I.M.F. Jan. 1999.

160. See *id.* at 67.

161. See *id.*

sia's "crony capitalism."¹⁶² Among the reforms demanded are tighter regulation of the "banking system, restructuring of the corporate debt, ending subsidies to special interest groups, and eliminating monopolies (some of which are owned by Indonesian President Suharto's family)."¹⁶³ The IMF also adopted "a plan to keep money and credit policies stable in hopes of strengthening the country's beleaguered currency"¹⁶⁴—which fell about eighty-five percent following Indonesia's financial crisis.¹⁶⁵

2. *Russia*

Another criticism of IMF policies grows from the issue of whether countries should fix their currencies in terms of dollars or let them drift according to the whims of the market. The logistics work in a way in which countries adopt a fixed exchange rate for their currency and pledge to convert their money into dollars at that rate.¹⁶⁶ While this often makes investors feel safe, it can have a similar effect as the stock market crash of 1929, when waves of leery investors all cashed in their notes at the same time.¹⁶⁷

Russia is a prime example of this danger. There, the government was using what are known as Government Short-term Obligation bonds (GKO's) which are similar to a pyramid scheme because the government issues bonds then pays them off with the proceeds from other newly issued bonds. Russia continued this practice for about two years until it received pressure from IMF economists to devalue its currency.¹⁶⁸ Initially, the IMF did not want to help because Russia failed to meet the conditions of overhauling its economy as it had agreed to do as a condition for two previous IMF loans.¹⁶⁹ Since 1991 and the collapse of the Soviet Union, the IMF has lent Russia \$18.8 billion.¹⁷⁰ Yet, President Clinton encouraged the IMF to make the additional loan after Boris Yeltsin personally asked for his assistance.¹⁷¹ Thus, Russia received a \$4.8 billion emergency loan in 1998. However, four weeks later it "reneged on promises to restructure the GKO bonds or pay . . . foreign investors."¹⁷² Instead, Russia said it "froze their international debt payments," decided to "pay GKO investors pennies on the dollar," and "abandoned efforts to prop up the ruble," which then fell into a free fall and went twenty below the dollar.¹⁷³

3. *Brazil*

Through a disbursement loan from the Special Reserve Facility,¹⁷⁴ Brazil was the recipient of a \$41 billion IMF aid program in November 1998. The loan comes in a front-loaded package

162. Art Pine, *IMF OK's \$1 Billion Loan Installment for Indonesia*, L.A. TIMES, May 5, 1998, at D3.

163. *Id.*

164. *Id.*

165. *See id.*

166. *See IMF's Response to the Asian Crisis-Factsheet*, available at <<http://www.imf.int/external/np/etr/facts/asia/htm>>.

167. *See id.*

168. *See* Richard Paddock, *Russia Plays Loose With IMF Billions; Finances: Central Bank Is Faulted for Squandering Emergency Loan*, L.A. TIMES, Sept. 24, 1998, at A1.

169. *See id.*

170. *See* Lane, *supra* note 159, at 17.

171. *See id.*

172. *Id.*

173. *See id.*

174. *See id.* The distinction between Brazil and the Mexican bailout is that Brazil's loan is not secured with collateral. While Mexico was also running out of liquid currency in the 1995 peso crisis, Brazil still has \$40 billion in their reserves. *See id.* *See also* John J. Kim & Gregory Gerdes, *International Institutions, International Legal Developments in Review: 1998*, 32 INT'L LAW. 575, 585 (1998) (describing the structure and purposes of this new IMF facility).

aimed at calming shaky investors and was approved with the objective of preventing the financial crisis from spilling over into Latin America.¹⁷⁵ Brazil has been targeted as a western hemisphere test case because it is braving the fiscal chaos that "threatens growth not only in emerging markets but economies around the world."¹⁷⁶

VI. International Treaties

In 1998, two Conventions aimed at preserving life and preventing acts of senseless violence stood out in the field of international treaties.

A. LAND MINES

In fall 1998, the United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction¹⁷⁷ went into force.¹⁷⁸ The agreement bans the manufacture, stockpiling, and use of land mines intended to kill or maim individuals.¹⁷⁹ There are at least 100 million anti-personnel mines in more than seventy countries.¹⁸⁰ Civilians are at the greatest risk and at least 500 civilians are killed or injured every week from these abandoned arms.¹⁸¹ Peace activists around the world work cooperatively to influence their governments to become parties to the convention. While the United States has yet to sign the convention, President Clinton stated that the United States would become a party by the year 2006, provided the Pentagon finds suitable alternatives to protect South Korea.¹⁸²

B. INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS

The Convention for the Suppression of Terrorist Bombings was concluded by the United Nations in 1998. The convention fills a gap in the existing web of anti-terrorist conventions by requiring states either to prosecute persons suspected of terrorist bombings or extradite them to other nations.¹⁸³ Similar to most anti-terrorist agreements, the convention is based on

175. See Johnathan Peterson, *Brazil to Receive \$41 Billion in Aid to Stave Off Crisis; Economics: IMF-led Package Will Combat Possibility of Financial Meltdown. Deal Includes \$5 Billion From U.S.*, L.A. TIMES, Nov. 14, 1998, at A1.

176. See *id.*

177. See Convention on the Prohibition of the Use, Stockpiling, Production & Transfer of Anti-personnel Mines & on their Destruction, 36 I.L.M. 1507 (1997) [hereinafter Convention on Anti-personnel Mines]. ("The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on May 3, 1996, and annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, appears at 35 I.L.M. 1206 (1996); The Final Act of the U.N. Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and the Convention, done at Geneva on October 10, 1980, appears at 19 I.L.M. 1523 (1980).")

178. See City Edition, *Treaty on Land Mines Now International Law*, IRISH TIMES, Sept. 18, 1998, at 4 [hereinafter *Treaty on Land Mines*].

179. See Convention on Anti-personnel Mines, *supra* note 177.

180. See *Treaty on Land Mines*, *supra* note 178.

181. See *id.*

182. See *Land Mine Ban; Clinton Sets A Date to Sign*, STAR TRIB. (Minneapolis, Mn.), June 5, 1998, at 20A ("... the Defense Department has argued that anti-tank land mines are needed on the Korean peninsula to deter an invasion from the north. The problem for the United States is that the Pentagon design mixes the two mine types to keep enemies from defusing the anti-tank weapons.").

183. See International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249, U.N. Doc. A/52/653 [hereinafter Terrorist Bombings Convention].

the principle of *aut dedere aut judicare* and deals with the following offenses: the unlawful and intentional delivery, placement, discharge, or detonation of an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility, where such act is committed (a) with the intent to cause death or serious bodily injury or (b) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss. Attempt and complicity also constitute offenses under the convention¹⁸⁴ and it excludes bombings undertaken by traditional military forces, which are already governed by the laws of war.¹⁸⁵

184. See Virginia Morris & M.-Christiane Bourloyannis Vraïias, *Current Development: The Work of The Sixth Committee at The Fifty-second Session Of The U.N. General Assembly*, 92 AM. J. INT'L L. 568, 574, 575 (1998).

185. See Terrorist Bombings Convention, *supra* note 183, art. 19, para. 2.